

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
Qwest Communications Company, LLC's)	WC Docket No. 10-227
Emergency Application for Review of the)	
Bluegrass Telephone Company, Inc. Tariff)	

**REPLY COMMENTS OF
ALL AMERICAN TELEPHONE CO., INC.**

Pursuant to the Wireline Competition Bureau's *Public Notice*,¹ All American Telephone Co., Inc. ("All American") submits these Reply Comments in the above-captioned rulemaking proceeding. In this Reply, All American demonstrates that the procedural approach taken by the Commission in this case is fundamentally at odds with the mandates of the federal Communications Act of 1934, as amended ("the Act"), and is done for the sole purpose of evading the Act's statutorily-mandated deadlines for decision-making. As such, this proceeding is *ultra vires*, and must be terminated.

The Bluegrass Telephone Company, Inc. ("Bluegrass") tariff that is the subject of the instant rulemaking proceeding was filed with the Commission on September 23, 2010, with an effective date of October 8, 2010. On September 30, 2010, Qwest Communications Company, LLC and Sprint Communications Company L.P. each filed a "Petition to Reject or in the Alternative Suspend and Investigate" the tariff.² These two petitions raised a host of arguments

¹ *Comment Sought on Qwest Communications Company, LLC Emergency Application for Review of the Bluegrass Telephone Company, Inc. Tariff*, WC Docket No. 10-227, DA 10-2219 (rel. Nov. 19, 2010) (*Public Notice*).

² *Bluegrass Tel. Co. Inc. d/b/a Kentucky Tel. Co.*, Petition of Qwest to Reject, or in the Alternative, Suspend and Investigate, FCC Tariff No. 3, Transmittal No. 3 (Sept. 30, 2010); *Bluegrass Tel. Co. Inc. d/b/a Kentucky Tel. Co.*, Sprint Petition to Reject or Suspend and Investigate, FCC Tariff No. 3, Transmittal No. 3 (Sept. 30, 2010).

against the Bluegrass tariff, including that specific tariffed terms violated the Commission's rules, that the rates were unlawful, that Bluegrass allegedly engaged in revenue sharing that was somehow unlawful, and that Bluegrass allegedly engaged in unlawful cross-subsidization. Bluegrass responded to those petitions on October 4, 2010, and explained why the tariff should be allowed to go into effect.³ No other carrier exercised its right under Section 204(a) of the Communications Act to challenge the tariff.

On October 14, 2010, the Pricing Policy Division of the Wireline Competition Bureau ("WCB") issued a *Report* that allowed the Bluegrass tariff to take effect.⁴ That order stated that:

[W]e conclude that the parties filing petitions against the tariff transmittals listed in this Report have not presented compelling arguments that these transmittals are so patently unlawful as to require rejection. Similarly, we conclude the parties have not presented issues regarding the transmittals that raise significant questions of lawfulness that require investigation of the tariff transmittals listed in this Report.⁵

In taking this action, the Division allowed the Bluegrass tariff, which was filed on 15 days' notice, to take effect, thereby conferring upon it "deemed lawful" status under § 204(a)(3) of the Communications Act.⁶ Under that section of the Act, "deemed lawful" status is conferred automatically by action of the statute unless the Commission takes action to suspend and investigate the tariff under § 204(a)(1) of the Act.⁷

On November 8, 2010 and November 16, 2010 respectively, Sprint and Qwest filed Applications for Review of the Division's Report. Bluegrass filed its opposition to the

³ *Bluegrass Tel. co. Inc. d/b/a Kentucky Tel. Co.*, Bluegrass Tel. Co., Inc.'s Response to Petitions of Sprint Commc'ns Co. L.P. and Qwest Commc'ns Corp. to Reject, or in the Alternative, Suspend and Investigate, FCC Tariff No. 3, Transmittal No. 3 (Sept. 30, 2010).

⁴ *Protested Tariff Transmittal Action Taken*, WCB/Pricing File No. 10-10, DA 10-1970 (rel. Oct. 14, 2010) (the *Report*).

⁵ *Id.*

⁶ 47 U.S.C. § 204(a)(3).

⁷ 47 U.S.C. § 201(a)(1).

Applications for Review on November 18. In its opposition, Bluegrass explained that the Applications for Review are both procedurally and substantively flawed.⁸ With all the parties participating in the original proceeding involved in the Application for Review process, the Commission could and should have provided final resolution of the issue based on the pleadings. However, despite issuing its *Report* and granting the Bluegrass' tariff "deemed lawful" status, the Commission subsequently issued the *Public Notice* on November 19, 2010, thereby creating this new docket and soliciting further comment on the Bluegrass tariff from the public – a public which had already chosen not to participate in the underlying proceedings giving rise to the Applications for Review, despite notice of the tariff filings.

The Commission's recent decisions to use these types of proceedings to review tariff filings are wholly unprecedented. The first time the Commission implemented this notice-and-comment process for a tariff filing was in response to Tekstar Communications' tariff filing (and several IXC's subsequent oppositions) which was filed on September 16, 2010, with the Public Notice issuing on November 16, 2010.⁹ Only three days later, on November 19, 2010, the Commission applied the same procedures in creating this docket. Why would the Commission re-open debate on the Bluegrass tariff less than six weeks after it concluded that neither Sprint nor Qwest raised sufficient concerns to justify any action against the tariff?¹⁰ Such an action is particularly questionable because, as Bluegrass explained in its opposition, the claims made by

⁸ Bluegrass Tel. Co., Inc.'s Response to Qwest Commc'ns Co., LLC's Emergency Application for Review and Sprint Commc'ns Co., L.P.'s Application for Review, *Bluegrass Tel. Co., Inc. d/b/a Kentucky Tel. Co. FCC Tariff N. 3, Transmittal No. 3*, WC Docket No. 10-227 (filed Nov. 18, 2010) ("Bluegrass Opposition"). All American generally agrees with the arguments contained in the Bluegrass Opposition, but focuses these Reply Comments on the impropriety of the creation of this notice and comment proceeding.

⁹ *Comment Sought on Sprint Communications Company L.P. Application for Review of the Tekstar Communications, Inc. Tariff*, WC Docket No. 10-226, DA 10-2196 (rel. Nov. 16, 2010)

¹⁰ Report at 1 ("[W]e conclude that the parties filing petitions against the tariff transmittals ... have not presented compelling arguments that these transmittals...require rejection.").

Sprint and Qwest in their Applications for Review are procedurally deficient.¹¹ Furthermore, institution of this proceeding clearly contravenes the principles of regulatory efficiency by creating a duplicative proceeding immediately after a dispositive *Report* was issued.¹²

Why would the Commission invite oppositions to the Bluegrass tariff by parties that, despite having notice, neglected to file a petition against the tariff within the timeframe set by the Commission's rules? Considerations of regulatory efficiency normally deny such multiple "bites at the apple." And why would the Commission open a docketed rulemaking proceeding in lieu of the investigation process that is expressly required for review of tariffed rates terms and conditions by the Communications Act, and which the Commission has routinely employed in the past?

There is only one reason for the unprecedented, duplicative and wasteful procedure that the Commission has introduced for the first time in the instant case – the Commission is taking extraordinary actions to evade the statutory deadlines that apply to investigations of tariffed rates, terms, and conditions. Specifically, the Commission seeks to circumvent the three avenues for review of tariffs provided in the Communications Act: section 204(a)(1), section 204(b), and section 208(b). Section 204(a)(1) of the Communications Act allows the Commission to prevent a newly filed tariffed rate from taking effect by suspending the tariff – but this suspension period may not exceed five months. 47 U.S.C. § 204(a)(1). Similarly, section 204(b) empowers the Commission to initiate a hearing to investigate a tariffed rate, but as with section 204(a)(1), those hearings also must be concluded and an order issued within five months. 47 U.S.C. § 204(b).

¹¹ Bluegrass Opposition at 4-7.

¹² See *Improving Public Safety Communications in the 800 MHz Band New800 MHz Band Plan for Puerto Rico and the U.S. Virgin Islands*, WT Docket No. 02-55, Third Report & Order and Third FNPRM, 25 FCC Rcd. 4443, ¶ 15 (2010) ("[i]t is well established that the Commission does not grant reconsideration for the purpose of allowing a petitioner to reargue matters already presented, considered, and disposed of by the Commission.") (footnotes omitted).

The third and final statutory option available to the Commission, section 208(b), allows the Commission to initiate a complaint proceeding to evaluate the lawfulness of any “charge, classification, regulation, or practice,” but just as with the first two options, the complaint proceeding must be concluded within five months. 47 U.S.C. § 208(b). Here, however, through its unprecedented decision to institute a rulemaking proceeding, the Commission has subjected the Bluegrass tariff to scrutiny under the one type of proceeding that is not constrained by such a statutory mandate – a clear subversion of the Act.

This type of proceeding has rarely been used to evaluate tariffed rates, terms and conditions, and it has never been used in this way since the five-month statutory deadlines discussed above were introduced into the Communications Act by the FCC Authorization Act of 1998.¹³ Indeed, as the legislative history makes clear, in adopting the relevant sections of the Act, Congress specifically sought to “protect the rights of consumers and competitors” from the harms that occur when “the FCC ... fails to reach a decision completing a tariff investigation in a reasonable amount of time.”¹⁴ As Senator Inouye noted in the Senate record at the time, “[t]his administrative delay in a nontrial proceeding would be troublesome in any context...[but] is especially troublesome in [tariff investigations] because the new rates are in effect pending the completion of the investigation.”¹⁵ This remains true in the current proceedings.

For reasons known only to itself, this Commission has steadfastly refused to issue any decisions that resolve the dispute between LECs that carry conference traffic and IXC that have engaged in a patently unlawful campaign of self help by refusing to pay tariffed access charges. The Commission has refused to provide certainty to the industry despite multiple primary

¹³ FCC Authorization Act of 1988, Pub. L. 100-594, § 8, 102 Stat. 3023.

¹⁴ 134 Cong. Rec. 31889.

¹⁵ *Id.*

jurisdiction referrals from federal district courts, repeated demands by both LECs and IXC's, and even letters from members of the Senate and House of Representatives.

The Commission's action constitutes a shocking abjuration of its statutory obligations. The Commission's adoption of extraordinary – and extraordinarily transparent – procedural contortions to evade the five-month decision-making deadlines imposed by sections 204 and 208 of the Communications Act defies the will of Congress and constitutes a gross disservice to the public interest. Because the establishment of the instant docketed proceeding evades the statutory deadlines required by sections 204 and 208 of the Communications Act, it is *ultra vires*, and the Commission must terminate this proceeding and dismiss the pending arguments against the tariff.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Jonathan E. Canis".

Jonathan E. Canis
J. Isaac Himowitz
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
202-857-6000
Counsel to
All American Telephone Co., Inc.

Dated: December 16, 2010

CERTIFICATE OF SERVICE

I hereby affirm that on December 16, 2010, I caused true and correct copies of the attached Reply of All American Telephone Co. Inc. to be served on the parties shown below:

Dated: December 16, 2010
Washington, D.C.

/s/ J. Isaac Himowitz

Marlene H. Dorch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by electric filing)

Best Copy and Printing, Inc.
Portals II
445 12th Street, S.W., Room CY-B402
Washington, D.C. 20554
Email: FCC@BCPIWEB.COM
(by email)

Pamela Arluk
Assistant Division Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Email: pamela.arluk@fcc.gov
(by email)